PROPERTY IN CHATTELS

III

PROPERTY IN THE BAILEE

IT was hard for the lawyers of the Year Books to reconcile themselves to the use by the bailee of the general writ of trespass. The goods which had been bailed were the goods of the bailor and not his, and it was hard for them to allow him to allege that "his goods" had been taken. They urged that he should have a special writ *in custodia sua*, but those in Chancery would give no such writ.[1] The general forms of trespass were hardening [2] and the bailee could no longer count in the natural way that had been possible in the time of Bracton. There are numerous examples of appeals in his time where the appellor did allege, not that the goods were "his," but that they were in his *custodia*.[3]

If we are to judge from Bracton's text and the case law of his time it was necessary for such an appellor to allege in addition that he had entered into an agreement to be accountable for the goods,[4] and we have one case [5] where Bracton says the appeal was not allowed because no such allegation was made.[6] The common allegation was that the appellor had entered into an agreement with his lord, and evidently had in mind the case of a servant or villein,[7] and it has been supposed that the effect of such an agreement was to make the servant a bailee,[8] and that in the case of one who was not a servant no such allegation would have been neces-

[1] Y. B. 48 EDW. III, 20–8; Y. B. 11 HEN. IV, 17–39, 23–46.

[2] See *supra*, pp. 382, 392.

[3] SEL. PL. CR. (S. S.), pl. 126; BRAC. NO. BK., pl. 723, 824, 1664; BRAC. (TWISS) fol. 146.

[4] BRACTON & AZO, pp. 179, 183; BRAC. (TWISS), fol. 103 *b*, 146; SEL. PL. CR. (S. S.), pl. 88, 126.

[5] BRAC. NO. BK., pl. 1664. See *supra*, p. 512.

[6] TWISS, fol. 146.

[7] See *supra*, n. 4.

[8] Such seems to have been Professor Ames' opinion. He cites the two cases from the SEL. PL. CR. (*supra*, n. 4) as involving bailees, History of Trover, 3 SELECT ESSAYS, 424, n. 4. And see *ibid.*, p. 425, n. 6, 7.

sary.[9] Bracton, however, expressly includes the case where goods other than those of a lord are involved,[10] and the line between the servant and the bailee was so hazy at this time, if it existed at all,[11] that it does not seem possible that the lawyers of the time had in mind that such an agreement would convert a servant into a bailee. They may have thought of such an agreement as imposing a like responsibility on the servant, or say a gratuitous bailee, as was imposed on a hirer or borrower, by the nature of his undertaking, and if such were the case, it may have been sufficient for the appellor to allege the hiring or borrowing without more. But if the responsibility imposed by such an agreement was an absolute responsibility, it is doubtful whether at this time any bailees were subject to such a responsibility without express agreement.[12]

However general the requirement of the allegation of such an agreement may have been, the fact that it had become a common form would indicate a general acceptance of responsibility as a reason for giving an appeal and would make it extremely likely, even though a hirer or borrower need not have made such an allegation, that such responsibility as he had was generally accepted as a reason for giving him the action. On the other hand, the only authority in Bracton's time which gives possession or seisin as a reason for giving him the action in such case is the Mirror of Justices.[13] In the other authorities [14] custody is used where, if the appeals had been thought of as distinctly possessory, we should expect seisin or possession. Custody in itself denotes a care or responsibility or trust which we would not associate with possession. And even if possession had been used it is very likely that the action would have been thought of as given for such responsibility as the possession of chattels carried with it,[15] rather than on the now accepted

[9] Maitland would seem to think that such an allegation was required only of servants. BRACTON & AZO, p. 183. And see 2 P. & M., 2 ed., 172, n. 2.

[10] Fol. 146. See *supra*, pp. 511, 512.

[11] See 2 P. & M., 2 ed., 172, n. 2, and *supra*, p. 502, n. 9.

[12] See *infra*, p. 735 *et seq.*

[13] SEL. SOC. Bk. II, c. 16, p. 57; *supra*, p. 509.

[14] *Supra*, p. 501, p. 509 *et seq.*, and see 2 P. & M., 2 ed., 176.

[15] Professor Ames gives as one reason why the bailee was allowed trespass and the appeals and at the same time the assize denied the termor, "the fact that an actual possessor of personal property being accountable therefor to the true owner needs a remedy to protect himself: whereas the land could not be carried off." LECTURES, p. 221. See also the argument of Brian, C. J., *infra*, p. 741 *et seq.*

theory that possession gives title as against strangers. The ready acceptance of responsibility as a basis for both trespass to chattels and trespass to land in the later law [16] would confirm the impression from what authority we have in the 1200's that the notion of responsibility as the basis for an action was deep-rooted.

The tendency in Bracton's text and the case law of Bracton's time "to require of the bailee who brings an appeal of larceny or an action of trespass something more than mere possession, some interest in the thing, some responsibility for its safety," [17] is pointed out by Pollock and Maitland, but as yet they thought it had not gone very far.[18] It is true that most of the authorities in which responsibility is emphasized as the reason for the action are somewhat later.[19] But there was no occasion in the earlier law to account for the right of the bailee to recover full damages against a stranger, and it was in this connection that the attribution of the bailee's right to general trespass to his responsibility over gained such general currency.[20] The earlier authorities on the point are meager, but so far as they go they strengthen the impression that the bailee's right of action was associated with his responsibility from the first.

This impression that the bailee's right to an action was attributed at a very early time to his responsibility is further strengthened by the fact that it was not long after Bracton wrote that the same explanation was made on the Continent by Beaumanoir.[21] Mr. Justice Holmes has argued that Beaumanoir's explanation was an inverted one, and that the bailee did not have the action because of his responsibility, but that his responsibility was due to the fact that he and he alone had the action.[22] That he had the action was ascribed to the importance of fresh pursuit in the executive procedure of the old Germanic action for cattle stealing.[23] But that the importance of fresh pursuit was the cause and that the liability of the bailee was the consequence of giving the action to the bailee would seem to be an entire assumption. Professor Ames gives them

[16] *Infra*, p. 737 *et seq.*, p. 749 *et seq.*
[17] 2 P. & M., 2 ed., 172.
[18] *Ibid.*
[19] See *infra*, p. 737 *et seq.*
[20] See *infra*, p. 734.
[21] *Coutumes du Beauvoisis*, XXXI, 16, cited by HOLMES, COMMON LAW, p. 167.
[22] *Ibid.*
[23] *Ibid.*, p. 165 *et seq.* See also *supra*, p. 505.

as concurring causes [24] and Pollock and Maitland say that "perhaps we come nearest to historical truth if we say that between the two old rules there was no logical priority. The bailee had the action because he was liable and was liable because he had the action." [25]

The liability Mr. Justice Holmes and the others had in mind was an absolute liability on the part of the bailee for goods taken from him, and if such a liability did exist it mattered little to the bailee whether his right of action was based on possession or on his responsibility to the bailor. In either case he would have the action. If, however, he was not liable to the bailor where the goods were taken from him without his fault, as in the case of robbery, the insistence on his responsibility to entitle him to the action would lead to a denial of the action where he was not at fault or to giving him the action in such a case, not because he was liable in the case at hand, but because of his general liability as bailee, whatever that might be. It must have been this general accountability on which his right to trespass was based by those who, notwithstanding the repudiation in *Coggs* v. *Bernard* [26] of the absolute liability of the bailee, continued to place his right of action on his responsibility to the bailor. But while this general accountability might have been a satisfactory explanation of his right to an action and even to the specific recovery of the goods, it could not have been a satisfactory explanation of the recovery by the bailee of the full value of the goods. If his recovery depended on his responsibility, the damages to which he was entitled must have been measured by his responsibility, and unless he had been at fault, his damages would have been nominal, beyond the value of his interest. If the judges of the Year Books wished to allow the bailee the full recovery allowed in general trespass, they had to abandon the notion that his right of action was based on his responsibility over and place it squarely on the ground that the possessor was owner as to third parties, or to retain it and make that responsibility absolute. Such great judges as Littleton and Brian chose the latter course.[27] Their equally eminent companion, Choke, chose the former,[28] and in the end his view was to prevail. But it shows how vital Littleton and Brian thought something beyond mere possession was to support

[24] LECTURES, p. 221.
[25] 2 P. & M., 2 ed., 171.
[26] 2 Ld. Raym. 909 (1703).
[27] Y. B. 9 EDW. IV, 33–9; *infra*, p. 741.
[28] *Ibid.*

general trespass that the absolute liability which they assumed found little support in the English authorities,[29] and that their assumption of such a liability was the main foundation for the argument of Mr. Justice Holmes[30] in support of the two judges in Southcote's case[31] that such absolute liability was once a part of the law of the English courts.

The measure of the liability of the bailee and his right of action are so closely connected that they will be considered together. This involves going over the ground traversed by Coke in Southcote's case,[32] by Lord Holt in *Coggs* v. *Bernard*,[33] and in our own day by Mr. Justice Holmes[34] and Professor Beale;[35] but the cases are approached from a somewhat different angle, and it is hoped that their reëxamination will shed some light not only on the early liability of the bailee but also on the foundation of his right of action.

The borrower was held by Glanvill to be absolutely bound to restore the thing or its value,[36] and was held to an almost equal degree of liability by Bracton,[37] but as to other bailees Bracton followed the more liberal tenets of the Roman law.[38] In 1200[39] a plaintiff who had delivered two charters to the defendant for custody was allowed to recover although the defendant had pleaded that the charters had been stolen and burned when his house was burned and that he was appealing the burners whereof the plaintiff was one. But after pleading, the defendant had made default and the plaintiff had craved that it be allowed in his favor that the defendant had admitted that the charters had been lost after action brought. If the case is one of a loss after demand and refusal, it has not such significance as to the absolute liability of the bailee. In the other case (1299) cited by Pollock and Mait-

[29] See *infra*, p. 744.

[30] See COMMON LAW, p. 177 *et seq.*, and especially the notes on p. 178. That the cases in question were Mr. Justice Holmes' principal English authorities, see Beale, Carrier's Liability, 3 SELECT ESSAYS, 152, and *infra*, p. 736 *et seq.*

[31] Cro. ELIZ. 815 (1601); 4 Co. 83 *b*.

[32] 4 Co. 83 *b*.

[33] 2 Ld. Raym. 909 (1703).

[34] COMMON LAW, p. 175 *et seq.*

[35] Carrier's Liability, 3 SELECT ESSAYS, 148.

[36] Lib. X, c. 13, cited 2 P. & M., 2 ed., 171, and HOLMES, COMMON LAW, p. 175.

[37] Fol. 99 *b*; BRACTON & AZO (S. S.), p. 147.

[38] Fol. 62 *b*, 99; 2 P. & M., 2 ed., p. 171.

[39] SEL. CIV. PL. (S. S.), pl. 8, cited 2 P. & M., 2 ed., 171.

land [40] the defendant in detinue for charters tendered the charters without the seals and alleged that robbers had cut off the seals, and on the admission that this had been so the action was dismissed. Pollock and Maitland cite this case in illustration of their summary "that already in his [Bracton's] day English lawyers were becoming familiar with the notion that bailees need not be absolutely responsible for the return of the chattels bailed to them, and that some bailees should perhaps be absolved if they have attained a certain standard of diligence." [41]

The authorities on the right of action of the bailee and the extent of his liability in the 1300's are scanty. Attention has already been called to the case in 1374 [42] where trespass was given to both the bailee and the bailor, to the one on account of his custody, to the other on the ground of his property, and to the remark of counsel in 1344 [43] in an action for the recaption of beasts against the peace brought by one who claimed that the one from whom the beasts had been taken was his villein, that "a writ of trespass and a writ of appeal are given to him to whom the property belongs, and also to one out of whose possession the goods are taken." In 1315 [44] in detinue the defendant pleaded that the chattels had been locked in a chest to which the plaintiff had the key and that the chest had been broken open by thieves and the chattels carried away by them together with the defendant's own goods. The reports are conflicting as to the issue finally taken. Fitzherbert's account, on which the older authorities rely, says that the plaintiff was driven to take issue on the theft, and this has been taken to mean that it was the plea of a delivery in inclosure that had made theft a valid defense;[45] but the printed Year Book says that the plaintiff replied that the chattels were delivered out of inclosure and that issue was taken on this allegation. A most probable explanation of Fitzherbert's remark,[46] and one that in part reconciles the two reports, is that the plaintiff pleaded tentatively as in the Year Book,[47] but

[40] Page 171 (N. 6).

[41] Page 171.

[42] Y. B. 48 EDW. III, 20–8; *supra*, p. 508.

[43] Y. B. 18 & 19 EDW. III, 508; *supra*, p. 509.

[44] Y. B. 8 EDW. II, 275; FITZ. ABR., Detinue 59.

[45] 4 Co. 83 *b*.

[46] As to the expression *chacé outre*, see Maitland's Introduction, Y. B. 3 EDW. II (S. S.), vol. iii, p. lxx.

[47] As to tentative oral pleading in the time of Edward II, see *ibid.*, p. lxv *et seq.*

that the report in the Year Book is incomplete [48] and that instead of issue being taken on this plea,[49] the plaintiff was driven over to take issue on the theft. If this explanation is correct the case is a strong authority that theft was available to the general bailee as a defense. In a case in 1354 or 1355 [50] the goods had been pledged to the defendant. He pleaded that he had put them with his own goods and that they had been stolen, to which the plaintiff replied a tender and refusal before the theft on which issue was taken. This is the first of the cases in which any statement of the liability of the bailee is made. W. Thorpe, B., said: "If one bails me goods to keep, and I put them with mine [*enter les mains*] and they are stolen, I will not be charged."

In the Michaelmas term of 11 Henry IV (1409) we have two of the cases where the defendant urged that the bailee should have brought a special writ *de averiis in custodia sua existantibus*.[51] In the first case,[52] which was a general replevin, Thirning, C. J., dismissed the matter with a curt "Plead no more about this matter, for against you he has property." In the second case [53] general trespass was brought by one who had hired certain beasts for a year from his servant, for a taking during the term. In his replication the plaintiff first alleged that the servant had taken them and sold them to the defendant. His counsel urged in his favor the holding in the replevin case, but Hankford, J., said:

"and so he has entered on the action as of his own goods, because they were taken within the term and this he will not have for then he would recover the value of the beasts against him who has the property in the beasts and it is not reason and I agree that in a certain case one will have a general writ of trespass although the beasts are another's, but if I allow certain beasts to you for a certain time and take the beasts within the term you will not have a writ of trespass as of your own goods for

[48] For abundant illustrations of just such variance in the different reports of a case at this time, see *ibid.*, p. lxxii *et seq.*

[49] It seems to have been possible at this time to traverse the bailment in detinue without responding to the tortious detainer (Y. B. 3 EDW. II, 78; Y. B. 6 EDW. II, 192; Ames, 3 SELECT ESSAYS, 432), but in another case in the same term the judges had little patience with an attempt to take issue on the kind of bailment and the party was "driven over" to a more substantial defense. See Y. B. 8 EDW. II, 270.

[50] 29 Ass. 163, pl. 28. See Beale, Carrier's Liability, 3 SELECT ESSAYS, 152, n. 2.

[51] *Supra*, p. 731.

[52] Y. B. 11 HEN. IV, 17–39.

[53] Y. B. 11 HEN. IV, 23–46.

then you would recover damages against me for the true value of the beasts and this is not reason but you will have a writ of trespass on the case for the loss of the manurance and compesture."

To the argument of counsel that they were in the case supposed because the action was against a stranger, Hankford replied:

"In effect you are in the same case, for he who had the property sold them to the defendant and that is the effect of his justification, and that is the reason that you will not recover damages for the value against him and also you are not chargeable against him who loaned you the beasts for he has sold them to the defendant, but if a stranger who has nothing to do with them take beasts in my custody, I shall have writ of trespass against him and shall recover the value of the beasts, because I am charged with the beasts against him who bailed them to me and who has the property but here the case is wholly otherwise,"

which Hill and Culpeper conceded. Counsel for the plaintiff then shifted his plea and alleged that the defendant himself had taken the goods a long time before the sale. It was admitted that in such a case the plaintiff had at one time had an action. The only question was as to whether it had been affected by the subsequent sale. Culpeper urged that in trespass the return of the goods would be considered in mitigation of damages. This Hankford and Hill denied. Hankford said that a plea that the plaintiff was possessed of the goods would discharge the action, and Hill that if the defendant had pleaded not guilty the court could do nothing on the record but award full damages.[54]

It is believed that it was the difficulty of allowing anything less than a full recovery in general trespass as shown in this case rather than any theory of possession that accounts for the rule allowing the bailee the full recovery of damages. The general writ of trespass for the taking and carrying away of chattels gave the value of the chattels, and the judges felt loath to allow it where that was not a reasonable measure of damage. They felt that if less than that was the proper measure of damage that a special writ should be used. But the writ in which the full value of the property was given had come to be more and more the general form and it was hard to obtain any other, and it was allowed as against the third hand.

[54] Later Culpeper's view came to prevail. (See Ames, History of Trover, 3 SELECT ESSAYS, 426.) But the part played by procedural limitations in the modern rule allowing in general a full recovery for a conversion is not likely to be exaggerated.

The judges drew the line, however, when its use was attempted against the bailor and reconciled the two cases by the statement that in the former case the bailee was responsible to the bailor. It is by no means clear that Hankford meant to impute an absolute liability to the bailee,[55] but in making the recovery of damages dependent on responsibility he was making it necessary to impute an absolute liability to the bailee, if it was to be the rule that the bailee was to be entitled to general trespass against the third hand. There can be little doubt that some of the judges in following him did mean to impute an absolute liability to the bailee [56] and it is their apparent assumption of such liability that is the principal ground for Mr. Justice Holmes' contention that the absolute liability of the bailee was a part of the law of the Year Books.[57]

In 1431,[58] in reply to the statement of counsel that theft would excuse a bailee, Cotesmore, J., said:

"If I grant goods to a man to keep to my use, if the goods by his misguard are stolen, he will be charged to me for the goods, but if he be robbed of the goods, he is excusable by the law."

In 1455 [59] debt on a statute was brought against the marshal of the King's Bench for an escape. Choke pleaded that a great multitude of enemies of the king had broken open the jail and liberated the prisoner. Choke said:

"If enemies of France or other enemies of the King were here the marshal would be discharged, or if they had burned a house of the tenant for term of life he would be discharged of waste, or otherwise by sudden tempest the house were burned he would be discharged, so here."

Neither of the judges thought the plea sufficient, and Choke finally pleaded otherwise. Danby, J., said:

"In your case of enemies of the king and of sudden tempest there is reason, for then there is remedy against no one, but it is otherwise where the lieges of the king so act, for there you have action against them."

---

[55] He does not use the expression "chargeable *over*" which later became current. There would seem to be an implication of liability in the case at hand in this expression that there would not be in "chargeable" alone. The latter might well be used as equivalent to accountable or liable to account.

[56] Y. B. 2 EDW. IV, 15–7; Y. B. 8 EDW. IV, 6–5; Y. B. 9 EDW. IV, 33–9; Y. B. 9 EDW. IV, 40–22; HOLMES, COMMON LAW, 177–78; Beale, Carrier's Liability, 3 SELECT ESSAYS, 152.

[57] *Supra*, p. 735, n. 30.

[58] Y. B. 10 HEN. VI, 21–69.

[59] Y. B. 33 HEN. VI, 1–3.

Prisot, C. J., emphasized the difference between alien enemies and traitors and said that if, say twelve or twenty persons, lieges of the king, should in the night break open the prison and take the prisoners out,

"in this case the marshal would be charged for so negligently guarding and so here. But if by a sudden adventure of fire the prison were burned and they escaped, peradventure otherwise."

Choke's argument was entirely from the law of waste. No reference was made by anyone to bailments.

In the reign of Edward IV we find Hankford's reason for giving the bailee general trespass against the third hand working out to its logical result in an imputation of responsibility *over* to the bailor.[60] Littleton went even further than Hankford's reason made necessary and imputed a like responsibility over in case of robbery.[61] Danby also made an express statement that the bailee was liable in case of theft.[62] This statement of Danby's played an important part in Coke's report of Southcote's case [63] and in the imposition on the common carrier of his extraordinary liability.[64]

In 1462 [65] trespass was brought by one apparently a servant sent to collect his master's tithes. Littleton was counsel for the plaintiff. Objection was made that the plaintiff had done all in the right of the abbot, his master, and that the property was entirely in the master. The report reads:

"Littleton: I understand there is no diversity where I tell my servant to bring me goods which are in such a place and as he is bringing them they are taken out of his possession and where I give goods to one to keep and they are taken out of his possession. Danvers: Here they are not his goods but he is only charged to the abbot for them. Danby: For that he ought rather to have trespass and in so far as he is chargeable by writ of detinue to the abbot. Littleton: If he be robbed and despoiled, I say that he will have an appeal of robbery because he is chargeable over, which was conceded."

Six years [66] later trespass was brought by the wardens of a church, in which damage to the parishioners was alleged. It was objected

---

[60] *Supra*, p. 734; *infra*, p. 741 *et seq.*
[61] Y. B. 2 Edw. IV, 15–7; *infra*.
[62] Y. B. 9 Edw. IV, 40–22; *infra*, p. 742 *et seq.*
[63] *infra*, p. 746.
[64] *Infra*, pp. 746, 747.
[65] Y. B. 2 Edw. IV, 15–7.
[66] Y. B. 8 Edw. IV, 6–5.

that the writ ought to have read to the damage of the plaintiffs, but Littleton distinguished the case from that of the bailee in that the latter was chargeable to the bailor.

In 1469 [67] we have a remarkable discussion of the foundation of the right of the bailee to trespass by Needham and Choke and Brian and Littleton. Needham and Choke argued that the right was based on possession, but Brian and Littleton denied this and placed it on the bailee's liability to the bailor. It was Littleton that had the last word. The discussion arose over a question of "color" in an action brought by a prior for goods of the house taken away in the time of his predecessor. In the plea a bailment by the defendant had been alleged, but this had not been to the predecessor and the latter was rather in the position of a finder. Needham urged that when the predecessor

"had possession of the goods by that possession he was able to maintain an action if they were taken out of his possession against anyone except him who had right."

Brian to the contrary said:

"If I bail certain goods to a man to guard if they are carried off, he will have a writ of trespass on the possession for he is chargeable over to me. But if goods bailed to a prior are carried off, the successor will not have an action for he is not chargeable and so to no mischief."

Choke came to Needham's support with the case of the finder.

"Sir, if I lose a bundle of cloth in the road and a man finds it he can take it to keep it to my use, and may justify this, for it is a good deed to guard safely or otherwise they are lost, and he who has the goods will have an action against anyone except him who has right if they are carried off."

Littleton repeated Brian's argument that the prior would not be chargeable on the bailment to his predecessor, to which Choke replied that he would be if the bailment were under seal. Littleton:

"Then he would have an action. But it is otherwise of a simple bailment. And so in this case the successor is not charged over by this possession so as to give him color of title by such possession that is sufficient. But if it be said that the predecessor took them *damage feasant* such color is good, for he ought to have detained them until he had made

[67] Y. B. 9 Edw. IV, 33–9.

amends, and these amends would have been in right of the church. And so if the predecessor had taken the goods for rent in arrears." [68]

This ended the discussion.

The question was as to whether there had been color of "property" in the house in the time of the predecessor. If the right of the predecessor to bring his action had been based on the theory that possession gave him "property" as to wrongdoers then there was strong ground for arguing that this property was in right of his house, but Littleton and Brian denied that the bailee's right of action was due to any "property" against strangers arising from possession, but affirmed that it was due to his responsibility over. This seems to have been the first battle between the responsibility theory and the possession theory for supremacy in the field of trespass to chattels. The opportunity was favorable to the possession theory, for the case was really one of finding. No question of the recovery of the full value of the property was involved as in the case before Hankford, and although detinue lay for a finding, in such a case no contract would be involved to suggest accountability. And Choke, J., was a judge to make the most of such an opportunity. That the possession theory went down to defeat is evidence of how firm the hold of the responsibility theory was. Later, in *Armory* v. *Delamirie*,[69] the possession theory was to succeed in winning the ground that it had failed to gain here, that of the finder, and finally in the case of The Winkfield,[70] with the able help of Mr. Justice Holmes, to overcome the responsibility theory in its favorite field, that of the bailee. But this was long afterwards.

In the same term [71] occurred the remark of Danby to which we have already referred. In an action of account against a receiver the latter pleaded that the money had been robbed from him. This was held not to bar an account, but that if it were excusable he should show this in discharge before the auditors. After the report of the holding of the court is added the following:

[68] That the custody of the distrainor should have been considered by Littleton to give greater "color" of property to support trespass than mere possession would indicate that the denial of trespass to him in the later law was due not to the insufficiency of his interest, but to the fact that he had other remedies. But see Ames, Disseisin of Chattels, 3 SELECT ESSAYS, 551, and History of Trover, 3 SELECT ESSAYS, 425, n. 5.

[69] 1 Str. 505 (1722).

[70] [1902] L. R. P. Div., 42.

[71] Y. B. 9 EDW. IV, 40–22.

"Genney, If I bail goods to a man and they are stolen, he will be excused. Danby, If he receive them to guard as his own goods, he will be excused and otherwise not."

The stress laid on responsibility over as the basis of trespass was beginning to have its effect where liability was itself in issue.

This is seen in three cases from the reign of Henry VII in which the bailee's liability for goods taken from him by way of trespass is assumed and the attempt is made to differentiate robbery and theft from trespass. In detinue [72] it was considered as to whether if one bailed goods to the defendant to guard at the plaintiff's jeopardy it would be a good plea that such a one had taken the goods.

"Rede: It seems that it is no plea for the defendant can have an action against him who took the goods and so he is not damaged."

And

"it was suggested that if the goods are robbed from the bailee he is not chargeable over. But if they are taken by a trespasser of whom the bailee has cognizance he will be charged to his bailor and himself will have an action against the trespasser. Brian to Rede: You plead a general bailment and he has pleaded a special bailment and I ask you what damages the bailee will recover against him who took the goods. Rede: The value that he will be charged to the bailor. Brian: And that is nothing upon the matter."

This case is a good example of the vicious reasoning in a circle which was characteristic of the responsibility theory.

Keble, the opposing counsel to Rede in the above case, advanced this distinction between liability for trespass and liability for felony in two subsequent cases against sheriffs for escapes. He urged that there was no remedy over against the felon "for when he is attainted his goods and lands are lost and his body hung." To this Fineux replied:

"In case of the bailee and the stolen goods, I understand that the bailor will have an action of detinue for the bailee is able to have his remedy over. For I understand that the lessee for term of years is not excused in waste because felons did the waste, on which account he will have an action of trespass over against them and so he has his remedy over." [73]

---

[72] Y. B. 3 HEN. VII, 4–16.

[73] Y. B. 6 HEN. VII, 11–9.

In the second case Keble said:

"If I bail deeds and evidences to a man to guard generally, if his own goods are robbed he will be excused against the party as I understand, for this guard is chargeable to him to all intents as reason expounds as I would guard my own goods."

The report proceeds with Keble's argument and then continues as follows:

"Fineux to the contrary and denies the case of the bailment of goods and says that the bailee will be charged as he understands though his own goods are robbed. Fisher to the same effect and says that if an innkeeper has the charge of goods he will be liable notwithstanding that they are robbed from him and he has no remedy over, and so here." [74]

These are the authorities leading up to Southcote's case on which the claim is based that the absolute liability of the bailee was once the law of the English courts. Their tendency to fix an absolute liability on the bailee in order to account for his right of action or for his recovery of full damages finds a modern parallel in the case of the tenant. In the case of *Dix* v. *Jaquay* [75] a tenant for life was allowed to recover from a third party damages to the full extent of the injury although it was only the estate of the remainderman that had suffered. This was on the ground that the tenant was absolutely liable for the damage to the lessor. If any such liability does exist, it shows a reaction from what Professor Kirchwey states had become the law already in Littleton's day that "tenants for life and for years are liable for waste, however occasioned, which results from their default, and not otherwise" [76] and can be traced directly to placing the right of the tenant to recovery on his responsibility over.[77] But it is believed that such liability on the tenant's part has long ceased to be a part of the law [78]

[74] Y. B. 10 HEN. VII, 25–3.

[75] 94 App. Div. 554, 88 N. Y. Supp. 228, cited 2 TIFFANY, LANDLORD AND TENANT, p. 2103.

[76] Kirchwey, Liability for Waste, 8 COL. L. REV. 627.

[77] See the cases cited in 1 TIFFANY, LANDLORD AND TENANT, p. 738, n. 841. Attersol *v.* Stevens, 1 Taunt. 183 (1808); Cook *v.* Champlain Transportation Co., 1 Denio (N. Y.) 91 (1845); and Austin *v.* Hudson River R. Co., 25 N. Y. 334 (1862) are the leading cases. The statement of the absolute liability of the tenant in these cases was incidental to allowing him a full recovery against a stranger.

[78] See Kirchwey, Liability for Waste, 8 COL. L. REV. 425, 624. That ordinarily the lessee can recover only the loss to his interest, see 1 SEDGWICK ON DAMAGES

and that the same thing was true of the absolute liability of the bailee at the time these cases were decided. The authority of the cases in detinue [79] where the liability of the bailee was directly involved is certainly against any such absolute liability and in account robbery might be shown in discharge before the auditors.[80] The extraordinary liability of the marshal was not placed on any analogy to the law of bailments, but to that of waste,[81] and the remarks of Fineux in the two cases against the sheriff [82] were in reply to an argument against the absolute liability of the sheriff drawn from the law of bailments. There was reason to hold the sheriff to an extraordinary liability in debt for an escape for the execution creditor in such a case had no one but him to look to,[83] but it had long been the rule that the bailor could look to the wrongdoer.[84]

A new turn was given to the right of the bailee to sue by Fineux, J., in 1506.[85] Brian and Littleton had insisted on the responsibility of the bailee as the ground of his action, but denied that this responsibility was in the nature of "property." It was a liability and not an asset. Such liability Littleton contrasted with the lien of the distrainor which he thought might properly be called "property." Needham and Choke, on the other hand, had argued for a property as against third parties arising from possession.[86] Fineux confused the two theories, ascribed the "property" against a stranger to the responsibility of the bailee to the bailor, and spoke of the "special property" which had thus been "conveyed" to the bailee. The term "special property" stuck and came to be used in contradistinction to the "general property" of the bailor.[87]

---

9 ed., § 71. Tiffany regards the tenant as liable in waste for injuries by third persons, but considers such liability wrong on principle. 1 TIFFANY, LANDLORD AND TENANT, p. 740.

[79] *Supra*, p. 735 *et seq.*

[80] *Supra*, p. 742.

[81] *Supra*, p. 739.

[82] *Supra*, pp. 743, 744.

[83] See the argument of Keble, Y. B. 10 HEN. VII, 25–3.

[84] See *supra*, p. 513.

[85] Y. B. 20 HEN. VII, 1–1.

[86] *Supra*, p. 741.

[87] Y. B. 21 HEN. VII, 14–23; Heydon and Smith's Case, 13 Co. 67, 69 (1610), and see the cases cited in 1 GRAY, CASES ON PROPERTY, 266, n. 1. "Special property" has also been used to indicate the greater intensity of the right of the pledgee over that of the distrainor or lienholder, Mores *v.* Conham, Owen 123 (1609); Coggs *v.* Bernard, 2 Ld. Raym. 909, 916 (1703); especially to indicate the assignability of the pledge as compared with the personal character of the lien, Owen 123; Donald *v.* Suckling, L. R. 1 Q. B. 585 (1866).

Southcote's case,[88] decided in 1601, was the decision of but two judges, Gawdy and Clench, and was an action in detinue on a bailment to keep safe where the defense was that the goods had been robbed or stolen. According to Croke, the court held that "it is not any plea in detinue to say that he was robbed by one such; for he hath his remedy over by trespass, or appeal to have them again." The only authority cited is the Marshal's case.[89] It was not the case itself, so much as Coke's report of it, that made it important. As in all his reports Coke made himself the reconciler of everything that had been said in the Year Books on the point. He took Danby's statement in 9 Edward IV [90] as the general rule subject to certain exceptions, as in case of a pledge or delivery in a locked chest. Such authority as the case ever had was destroyed by Lord Holt in *Coggs* v. *Bernard*.[91]

A word may here be allowed as to the extraordinary liability of the common carrier. In Woodlife's case,[92] some four or five years prior to Southcote's case, Gawdy had said that it was no plea before auditors any more than the case was in 9 Edward IV for a carrier to say that he was robbed, to which Popham, C. J., had replied:

"There is a difference between carriers and other servants and factors; for carriers are paid for their carriage, and take upon themselves safely to carry and deliver the things received."[93]

Inconsistent as the principle of this was with the absolute liability of the general bailee, Coke adopted it in his report of Southcote's case and enlarged upon it:

"But a ferryman, common innkeeper or carrier, who takes for hire, ought to keep the goods in their custody safely, and shall not be discharged if they are stolen by thieves."

Henceforth the carrier was a marked man. That he was liable beyond the liability of others, seems to have been accepted without

---

[88] 4 Co. 83 *b*; Cro. ELIZ, 815 (1601).

[89] *Supra*, p. 739.

[90] *Supra*, p. 743.

[91] 2 Ld. Raym. 909 (1703). See Beale, Carrier's Liability, 3 SELECT ESSAYS, 149, 153.

[92] Moore 462; Owen 57 (1596).

[93] Owen 57 (1596).

question; but whether to place this liability on his hire,[94] on the custom of the realm,[95] or on his public calling,[96] there seems to have been no settled conviction. Equally it seems to have been accepted that the measure of his liability was that old liability that had filtered through the Marshal's case from the law of waste.[97] For act of God [98] or the public enemy [99] he was alone excused.[100] Lord Holt fixed on his public calling as the secret of his liability [101] and henceforth it was the *common* carrier who was to be thus burdened. How extended that burden was to be depended on the meaning to be given to act of God.[102] Lord Mansfield gave it the old interpretation it had had in waste and made the common carrier an insurer.[103] It is not believed that the liability is a survival of an older liability in the general bailee due to a confusion between detinue and case.[104] Doctor and Student had started the idea of a special responsibility in the carrier.[105] Gawdy seized on the case of the carrier to argue to the general liability of bailees and factors which he saw in Danby's statement in 9 Edward IV.[106] Popham, C. J., distinguished between the carrier and others [107] and although Gawdy's reaffirmation of his opinion in Southcote's case was to be practically still-born,[108] the distinction by Popham which it had originally drawn forth was to survive. It would appear to be a striking example of the eccentricities of case law.

But to return to the right of action of the bailee. It still remains to explain why, if trespass was not distinctly possessory, it seemed so natural to give the bailee an action that the judges in order to

---

[94] See Beale, Carrier's Liability, 3 SELECT ESSAYS, 156, n. 2.

[95] Rich *v.* Kneeland, Hobart 17 (1613); Matthews *v.* Hopkins, 1 Sid. 244 (1665).

[96] Rich *v.* Kneeland, Cro. Jac. 330 (1613).

[97] As to the influence of the Marshal's case, see HOLMES, 176, n. 6, and Beale, Carrier's Liability, 3 SELECT ESSAYS, 156.

[98] For "act of God" in waste, see Y. B. 12 HEN. IV, 5–11; 1 GRAY, CASES ON PROPERTY, 630.

[99] For "public enemy" in waste, see FITZ. ABR., Waste, pl. 30; 1 GRAY, CASES ON PROPERTY, 629.

[100] Kirchwey, Liability for Waste, 8 COL. L. REV. 436, 624.

[101] Coggs *v.* Bernard, 2 Ld. Raym. 909, 917 (1703).

[102] Beale, Carrier's Liability, 3 SELECT ESSAYS, 159.

[103] Kirchwey, Liability for Waste, 8 COL. L. REV. 436, 624.

[104] As argued by Mr. JUSTICE HOLMES, COMMON LAW, Lecture V.

[105] C. 38. See Beale, Carrier's Liability, 3 SELECT ESSAYS, 156.

[106] *Supra*, p. 746.

[107] *Ibid.*

[108] See Beale, Carrier's Liability, 3 SELECT ESSAYS, 153.

support the action imputed to him a liability which at best would seem to have been long obsolete. Why did not the insistence on responsibility over instead of leading to the imputation of an absolute liability to the bailee lead to the denial of the action to the bailee or at least to the denial of his right to a full recovery? [109] How explain the bias of the judges in the bailee's favor? Mr. Justice Holmes' explanation is that 'it was a survival of the old Germanic scheme according to which the bailee and the bailee alone had an action, and in turn was absolutely liable for the goods.[110] We have attempted to show that of two parts of that scheme there is very little evidence in the English authorities, the denial of the action to the bailor,[111] the absolute liability of the bailee.[112] It is possible that one part of the scheme did survive after the rest had become obsolete. It is possible that the bailee's right to general trespass had its origin in the fresh pursuit and the absolute liability of the primitive law. It is not necessary, however, to resort to the primitive law to account for the bailee's action.

It will be remembered that Bracton in one place seems to deny the bailee the appeal of larceny, but to allow him the appeal of robbery,[113] and that Maitland wondered [114] at this, for it was contrary to Mr. Justice Holmes' theory and was without foundation in the Roman law. Whether or not such distinction did exist, Bracton's statement confirms the view previously expressed [115] that it is in the appeal of robbery rather than in the appeal of larceny that the explanation of the right of the bailee to trespass is to be found. Now robbery involved a taking from the person. It was violence to the person that distinguished it from larceny. The person from whom goods had been robbed had suffered a personal wrong whether the goods taken from him were his or those of another. He had been robbed and it must have been a temptation

[109] The difficulty of procuring a special writ in trespass and the further difficulty of recovering less than full damages in general trespass has already been pointed out as an explanation of the rule allowing a bailee full recovery. (*Supra*, p. 738.) What follows is rather an explanation of his being allowed trespass at all and of its final attribution to his possession.

[110] COMMON LAW, Lecture V.

[111] Property in the Bailor, *supra*, p. 501 *et seq.*

[112] *Supra*, p. 735 *et seq.*

[113] TWISS, fol. 103 *b*; BRACTON & AZO, p. 179; *supra*, p. 510.

[114] BRACTON & AZO, p. 182; *supra*, p. 511.

[115] *Supra*, p. 507.

to the judges to give him the appeal of robbery even though they had to resort to a doubtful liability to do so. And the highly criminal character of the appeal would work to the same end.

The importance of the fact that general trespass was an action for a personal wrong has been seen in Brian's, C. J., reason for denying trespass against the second trespasser [116] and in the denial by some of trespass to a disseisee after reëntry for a trespass committed during the disseisin because it was not a trespass as to him.[117] That it did not lead to a denial of trespass to the bailor would seem to be due to the fact that the bailee held under and not adversely to him.[118]

General trespass then, like the appeal of robbery, was an extension of the protection thrown around the person and was in that sense possessory.[119] It did not purport to be based on possession, however, and in that respect was not an analogue to the assize of novel disseisin. And the right of the bailee to trespass was placed by Brian and Littleton, not on his possession, but on his responsibility over.[120] It was not therefore a distinctly possessory action. It was trespass to land that first became such. Trespass for an ouster seems to have been first allowed the termor.[121] In 1372 we find him allowed trespass *quare clausum*.[122] His right to the action is there coupled with his responsibility over. Tenants at will, according to the custom of the manor [123] and possibly *cestuis que use* in possession,[124] were likewise accorded trespass in the next century. So

---

[116] Y. B. 21 EDW. IV, 74–66; *supra*, p. 383.

[117] Y. B. 13 HEN. VII, 15–11; *supra*, p. 384, n. 64.

[118] *Supra*, pp. 514, 516.

[119] See 2 P. & M., 2 ed., 41; *supra*, pp. 384, 516.

[120] *Supra*, p. 741.

[121] What appears to be an early reference to trespass by a termor for an ouster occurs in an action of debt for rent where after disposing of the case of an ouster by the lessor, it is said that the lessee will be liable for the rent during the time he was tortiously ousted and that for such tort he is able to recover against him who ousted him. Y. B. 9 EDW. III, 7–16. For comment on this case, see AMES, LECTURES, p. 222, n. 7. See also *ibid.*, p. 226.

[122] Y. B. 47 EDW. III, 5–11; AMES, LECTURES, p. 226.

[123] Y. B. 2 HEN. IV, 12–49. See AMES, LECTURES, p. 227.

[124] Prior to the Statute of Uses, tenant at sufferance seems to have been used to indicate the *cestui que use* in possession. (1 SANDERS, USES, p. 65.) In 1489 it was said that if such a one brought trespass and the defendant did not raise the issue as to the title but pleaded not guilty the plaintiff might succeed. (Y. B. 4 HEN. VII, 3–6.) But see the cases cited in AMES, LECTURES, p. 227, n. 7, 8.

strong was the feeling that the copyholder should have some remedy in the king's court that he was allowed trespass even against his lord.[125] This "exploit" has been attributed to Danby and Brian [126] and could hardly have been based on possession as a root of title or as in itself a foundation for trespass, for it was these judges who had combated such notions in trespass to chattels; but Brian had emphasized the idea of trespass to property as a personal wrong, and as an action to redress a personal wrong it was the natural instrument for the protection of hitherto unrecognized interests until finally those interests should come to be recognized as the basis of the action itself. This is believed to have been the history of trespass as a possessory action. In 1603 [127] it was said that the lessor for a term would have case during the term but not trespass, "it being found merely on the possession," and in the following century we get the broad sweeping statements as to the possessory character of trespass to which we are accustomed but which cannot with accuracy be read into its past.[128]

Trespass to chattels could hardly help being influenced by the increasing importance attached to possession in trespass to land. In 1722, in *Amory* v. *Delamirie*,[129] it was said that "the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such an property as will enable him to keep it against all but the rightful owner." As late as 1840,[130] however, we find Baron Parke saying that it was unnecessary in the case at hand "to decide the question, whether, in an action of trespass or trover for *personal* property, the simple fact of possession, which is unquestionably evidence of title, is *conclusive* evi-

---

[125] LITTLETON, TENURES, § 77. Littleton probably did not write this passage. (Ed. by Wambaugh, p. 35.)

[126] See 1 P. & M., 2 ed., 359.

[127] Bedingfield *v.* Onslow, 3 Lev. 209 (1685). See *supra*, p. 517.

[128] Willes, C. J.: "Trespass is a possessory action, founded merely on the possession, and it is not at all necessary that the right should come in question." Lambert *v.* Stroother, Willes 218, 221 (1740). Mansfield, C. J.: "Whoever is in possession, may maintain an action of trespass, against a wrongdoer to his possession." Harker *v.* Birkbeck, 3 Burr. 1556, 1563 (1764). Kenyon, C. J.: "Any possession is a legal possession against a wrongdoer." Graham *v.* Peat, 1 East 244, 246 (1801). See also Osway *v.* Bristow, 10 Mod. 37 (1711); Johnson *v.* Barret, Al. 10 (1670); and AMES, LECTURES, p. 227.

[129] 1 Str. 505 (1722).

[130] Elliot *v.* Kemp, 7 M. & W. 306, 312.

dence, and constitutes a complete title, *in all cases*, against a defendant who is a mere wrongdoer, as it does in actions of trespass to real property, and in those actions for injuries to personal chattels, in which the plaintiff had a special property in such chattels." Finally in the case of The Winkfield in 1901 [131] the question which Baron Parke had raised was answered as Choke had argued it should be answered so long before and the postmaster-general was allowed to recover the full value of the thing bailed to him although he would not have been responsible for its loss.

Percy Bordwell.

STATE UNIVERSITY OF IOWA.

[131] [1902] L. R. P. Div., 40.